IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MICHEAL L. McLAUGHLIN,	)	
	)	Court of Appeals No. A-10406
Appellant,	)	Trial Court No. 3HO-06-506 CR
	)	
v.	)	
	)	MEMORANDUM OPINION
STATE OF ALASKA,	)	
	)	AND JUDGMENT
Appellee.	)	
	)	No. 5851 — May 30, 2012

Appeal from the Superior Court, Third Judicial District, Homer, Margaret L. Murphy, Judge.

Appearances: Micheal L. McLaughlin, in propria persona, Hudson, Colorado, for the Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and John J. Burns, Attorney General, Juneau, for the Appellee.

Before: Coats, Chief Judge, and Mannheimer and Bolger, Judges.

COATS, Chief Judge.

Micheal L. McLaughlin was convicted of felony driving while under the influence, felony refusal to submit to a breath test, and driving while license revoked. The case was bifurcated, and after a jury convicted McLaughlin of the DUI and the refusal,

he chose to have a bench trial to determine the existence of the prior felony DUI conviction required to enhance the DUI and the refusal to felony offenses.

On appeal, McLaughlin claims that the superior court wrongly prevented him from proving that his prior felony DUI was not valid. He also claims that his trial attorney was ineffective because the attorney declined to file a petition for review when the superior court denied a post-trial motion for reconsideration. For the reasons explained here, we affirm McLaughlin's felony convictions.

Background

On October 10, 2006, Alaska State Trooper Ryan Browning stopped the vehicle McLaughlin was driving because it had a loud muffler. Soon after contacting McLaughlin, Browning noticed indications that McLaughlin might be intoxicated. After McLaughlin failed some field sobriety tests, he was arrested for DUI. Later, at the Homer Police Station, McLaughlin refused to submit to the breath test.

McLaughlin was charged with felony DUI, felony refusal, and driving while license revoked.[1] The DUI and breath test refusal were charged at the felony level because McLaughlin had a 2004 felony DUI conviction.[2]

The trial was bifurcated. In the first phase, the jury found McLaughlin guilty of DUI, refusal, and driving while license revoked. The second phase was conducted

---

[1] AS 28.35.030(a) and (n), AS 28.35.032 (a) and (p), and AS 28.15.291(a).

[2] *See* AS 28.35.030 (n): "A person is guilty of a class C felony if the person is convicted under (a) of this section and either has been previously convicted two or more times since January 1, 1996, and within the 10 years preceding the date of the present offense, or punishment under this subsection or under AS 28.35.032(p) was previously imposed within the last 10 years."

without a jury. During the second phase, without objection, the State submitted a certified copy of a judgment showing that McLaughlin had been convicted of felony DUI in 2004.

For his part, in the second phase of the trial, McLaughlin asserted that his plea in the 2004 felony conviction was void because it had not been voluntary. He claimed that three days into the 2004 DUI trial, he felt he had no choice but to enter a plea. According to McLaughlin, he had discovered that the State had lost the original print-out of the breath test results, and he had not been allowed to confront the loss of this evidence or to call certain witnesses to explain the circumstances regarding the loss.

The State argued that McLaughlin was not entitled to challenge the validity of the 2004 conviction. Superior Court Judge pro tem Margaret L. Murphy agreed. She ruled that McLaughlin's attack on his plea had to be raised in a petition for post-conviction relief.

McLaughlin then testified that he had not been adequately represented at the 2004 trial. He explained that he had requested that he be allowed to act as co-counsel, but the request had been denied. He also explained why he thought his attorney in the 2004 trial had been ineffective. But when he started to testify about statements that the trial judge had made, the State objected on hearsay grounds. The objection was sustained, and McLaughlin's attorney announced that he had no further questions.

When the State then cross-examined McLaughlin, he confirmed that an attorney had been appointed to represent him during the 2004 trial, and that the attorney had been with him during the trial.

After the State completed its cross examination, Judge Murphy asked if McLaughlin had any further evidence to offer. McLaughlin said he did not.

After deliberating, Judge Murphy found that the State had proven the existence of McLaughlin's 2004 felony DUI conviction. She then found him guilty of felony DUI and felony refusal in the instant case.

Approximately a week later, McLaughlin moved for reconsideration. Despite his assertion at the end of trial that he had no additional evidence to offer, he claimed in his motion that when he testified in the second phase of the trial, he had intended to lay the foundation for more evidence that would support his claim that his 2004 judgment of conviction was void. He contended that during the second phase of the trial, Judge Murphy erred because she had "refused to allow any facts of the prior case in as evidence[.]" Judge Murphy denied the motion.

Afterwards, although represented by counsel, McLaughlin filed a pro se petition for review. Ultimately, this court denied the petition, concluding that a defendant, when represented by counsel, has no right to proceed on his own to file a petition for review (that is a prejudgment request for interlocutory review) when his attorney had declined to do so.[3]

McLaughlin now appeals.

Discussion

McLaughlin was not allowed to collaterally attack the validity of his 2004 DUI conviction

McLaughlin claims that a defendant in a felony DUI or refusal case has the right, as part of his defense, to challenge the *validity* of the predicate DUI or refusal convictions, not just their *existence*. He asserts that our decision in *Brockway v. State*,[4] where we limited a collateral challenge against a prior conviction during sentencing proceedings, does not apply during the merit portion of a trial.

---

[3] *See McLaughlin v. State*, 173 P.3d 1014, 1016-17 (Alaska App. 2007).

[4] 37 P.3d 427 (Alaska App. 2001).

Although the predicate DUI or refusal convictions are an element of felony DUI and refusal offenses, the language of the pertinent statutes — AS 28.35.030(n) and (u) and AS 28.35.032 (p) — does not require the State to prove or relitigate whether the predicate convictions were valid. We addressed this issue in *Ross v. State*,[5] where we held "that *the existence* of the two prior [DUI] convictions is an element of the crime [of felony DUI]."[6] We relied on our previous decision in *Morgan v. State*.[7] There, we noted that "[t]he prior conviction element comprises two major issues of fact: whether the state has demonstrated the existence of the prior conviction, and whether the state has demonstrated that the defendant was the person convicted."[8] In other words, when a prior conviction is an element of an offense, the State must prove the existence, not the validity, of the prior conviction.

As McLaughlin recognizes, we addressed a related issue in *Brockway* and held that a defendant generally has no right to collaterally attack prior convictions at the sentencing hearing for a new crime, even if the defendant's sentence for the new crime is being enhanced on account of those prior convictions.[9] We acknowledge, as McLaughlin points out, that *Brockway* involved proving the existence of prior convictions for sentencing enhancements as opposed to proving them as elements of an offense. But in light of the decisions in *Ross* and *Morgan*, this is a difference without significance.

---

[5] 950 P.2d 587 (Alaska App. 1997).

[6] *Id.* at 589 (emphasis added).

[7] 661 P.2d 1102 (Alaska App. 1983).

[8] *Id.* at 1104 n.3 (citing *State v. Furth*, 104 P.2d 925, 933 (Wash. 1940)).

[9] 37 P.3d at 429-30.

Accordingly, we conclude that McLaughlin was not entitled to collaterally attack the validity of his predicate felony conviction at the trial of his current offense.

We note that in *Brockway*, we pointed out that there is an exception to this rule limiting a collateral attack upon the validity of a prior conviction. There, we concluded that a defendant can try to prove that his prior conviction occurred in a proceeding where he was not represented by counsel, and where there had been no waiver — or an invalid waiver — of the right to counsel.[10]

But this exception is strictly construed and requires a total lack of the assistance of counsel; an allegation of ineffective assistance is not sufficient.[11] As we explained, "because Brockway did not claim that he was totally deprived of counsel, he had no right to attack his [prior] convictions in the present case."[12] Hence, the exception does not apply here because McLaughlin testified that he was represented by counsel at the 2004 proceedings.

In sum, the State had to prove that McLaughlin had a predicate qualifying conviction, but did not have to prove that the conviction was valid. To prove that McLaughlin had the required prior conviction, the State had to prove two things: the existence of the prior conviction, and that McLaughlin was the person convicted. The State did this with a certified copy of McLaughlin's 2004 felony DUI conviction. McLaughlin had the opportunity to testify or produce evidence that the conviction did not exist, or that he was not the person convicted. But Judge Murphy correctly ruled that McLaughlin's testimony addressing the validity of his prior conviction was not relevant. We find no error.

---

[10] *Id.* at 430.

[11] *Id.*

[12] *Id.*

We decline to resolve McLaughlin's ineffective assistance claim because that claim has not been litigated in the superior court

McLaughlin claims that his attorney was ineffective because he declined to petition for review of Judge Murphy's ruling denying McLaughlin's motion for reconsideration. (McLaughlin subsequently attempted to file a petition on his own.[13]) McLaughlin argues that his attorney, by not filing a petition for review, allowed McLaughlin to be wrongfully convicted of two felonies. He contends that his attorney should have sought review by this court, before his sentencing hearing, so that this court would have had the opportunity to overturn Judge Murphy's ruling.

But McLaughlin has not litigated his ineffective assistance claim in the superior court. Hence, he is asking this court to resolve a claim of ineffectiveness in a direct appeal from the action in which the ineffectiveness allegedly occurred.

In *Barry v. State*,[14] we explained that we would almost never be able to resolve ineffectiveness claims raised for the first time on direct appeal. We stated that, "[p]ractically speaking, an appellate court is almost never able to find ineffective assistance of counsel in the absence of an explanation in the record for counsel's actions."[15] To properly set out counsel's actions and the reasons for those actions, "an evidentiary hearing is almost always a prerequisite to an effective assertion of ineffective assistance of counsel."[16] Consequently, we held that in all but those rare cases where

---

[13] *See McLaughlin v. State*, 173 P.3d 1014 (Alaska App. 2007).

[14] 675 P.2d 1292 (Alaska App. 1984).

[15] *Id.* at 1295.

[16] *Id.*

counsel's error is "plain," claims of ineffective assistance should be brought in a separate post-conviction action.[17]

Applying this rule, we have consistently held that we will not consider claims of ineffective assistance for the first time on appeal when the appellate record is inadequate to allow the court to meaningfully assess the competence of the attorney's efforts.[18] McLaughlin's case is typical — that is, the appellate record is inadequate to allow this court to meaningfully assess the competence of McLaughlin's attorney's tactical decisions. Accordingly, we decline to resolve this claim of error. McLaughlin must first seek relief through an application for post-conviction relief.

Conclusion

We AFFIRM the superior court's judgment.

---

[17] *Id.* at 1295-96.

[18] *See Tazruk v. State*, 67 P.3d 687, 688 (Alaska App. 2003); *Hutchings v. State*, 53 P.3d 1132, 1135-36 (Alaska App. 2002); *Sharp v. State*, 837 P.2d 718, 722 (Alaska App. 1992).